Supreme Court, U.S.
FILED

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

RICHARD AND MARILYN SACKMAN

Petitioners

v.

ZONING BOARD OF ADJUSTMENT
TOWNSHIP OF EAST BRUNSWICK, NEW JERSEY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD AND MARILYN SACKMAN
Pro Se
33 Hamlin Road
East Brunswick, NJ 08816
(908)257-3600

85 pp

QUESTIONS PRESENTED

1. Can an administrative board ignore its charter completely and exercise its police power abusively, depriving Plaintiff/Appellants of their constitutional rights to determination by rules of evidence and fair judicial review?

2. Did the lower courts give undue weight to the board's decision and ignore the evidence elicited therefore denying Plaintiff's rights to fair and equal justice under the law?

3. Do administrative boards (as in this case) abuse their power and trample on the rights of thousands of Americans every year who can not afford or are incapable of appealing these unfair decisions through the courts, since it is obvious that the courts are predisposed to rubber stamp the boards for the sake of expediency without consideration for the constitutional rights of the individual citizen?

4. Did the New Jersey Appellate Court err when it recognized a conclusory resolution which is against New Jersey case law (Medici) and not remand?

5. Did the judge in the lower court law division err in not recognizing the promulgation of a conclusory resolution in rendering her decision, but rather lean on the side of justifying the board's decision as noted in her opinion?

6. When the Federal District court appeal was presented, was the magistrate correct when at a pretrial briefing he encouraged the defendant's attorney to file a motion to dismiss, therefore reducing this appeal from a jury trial to a motion hearing?

7. Did the Federal District Court judge properly address the motion field, in that he was asked to rule on a motion to dismiss? The appeal was predicated on the depriving of Plaintiff/Appellant's rights by a predisposed board, a rubber stamp law judge, an appellate court that recognized a deficient resolution and chose to ignore it, a New Jersey Supreme court who refused to hear it, and now a judge who in court for the record indicates that he has many cases on his desk (about 200) but there are only three really important ones. Obviously this was not one of them. He then tries the case without any submission of brief or

documentation by the Plaintiff and renders a decision not only on the motion but on the case, wherein he further deprived Plaintiff/Appellant's rights to equal justice and proper, fair judicial review.

8. When rendering his decision, did the District Court judge err in trying the case by paper and assuming that whatever the board promulgated was based on testimony and/or evidence submitted, or did he assume much of the record as previously presented in decisions of lower courts?

9. Why is there an appeal process which starts out assuming administrative boards are correct, and for expedience sake does not want to be confused with facts or reality?

10. If an appeal process for "fair judicial review" is to be valid, where in the process can the damaged party seek redress when upon entering the court system the judges are all predisposed to make the following statement, "It is a well-established principle governing judicial review of a decision of a municipal board on a variance on site-plan application, that said decision is presumed by the court to be correct, and is to be upset only in the event that the

decision was arbitrary, unreasonable, or capricious." The judge further goes on to say, "That the board has the discretionary power to accept or reject the testimony of witnesses and, where reasonably made, is conclusive on appeal." Does the total ignoring of the testimony by the board and obviously by the judge, not defy the principle as outlined above?

LIST OF PARTIES

The parties to the proceedings below were Petitioners Marilyn Sackman, Richard Sackman. Respondent, East Brunswick Township Zoning Board of Adjustment was defendant-appellee below.

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Hill Homeowners v. Passaic Zoning Board of Adjustment, Page 173, 129 N.J. Super. Zoning 541; Page 177, 129 N.J. Super, Zoning 541 (8, 9)

Stoltz v. Ellenstein, 7 N.J. 291, 295

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Brandon v. Montclair, Supra, 124 N.J.L. at 149

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1993

RICHARD SACKMAN AND MARILYN SACKMAN
Petitioners

vs.

EAST BRUNSWICK TOWNSHIP ZONING
BOARD OF ADJUSTMENT
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioners respectfully request that a Writ of Certiorari issue to review the Judgement Order of the United States Court of Appeals for the Third circuit entered on December 3, 1993.

OPINIONS BELOW

The judgement order of the United States Court of Appeals for the Third circuit is set forth in full in the Appendix at Page Appendix 11 of this petition.

JURISDICTION

The judgement of the United States Court of Appeals for the Third Circuit was entered November 8,

1993 and a motion for rehearing was denied and entered on December 3, 1993.

CONSTITUTION AND STATUTORY PROVISIONS

1. United States Constitution, Amendment 14, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor whall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Zoning 544, N.J.S.A. which provides:

> The findings of a board of adjustment must be substantially grounded in competent evidence, and reiterates the governing principle that the presumption of validity does not attach to a board of adjustment where that determination rests on facts dehors the record.

3. Zoning 544 N.J.S.A. 40:55-39 which states:

Denial of a zoning variance on summary finding couched in conclusory language of zoning statutes is not adequate, and there must be statement of specific findings of fact on which zoning board reached conclusion that statutory criteria for variance were not satisfied, and unless such findings are recited reviewing court can not determine fairly whether board acted properly within limits of its authority refusing variance.

4. N.J.S.A. 40:55D-70 states:

It is the situation of the land, and not that of the owner, that is the critical factor in determining hardship that requires grant of a zoning variance.

5. Zoning 541 states:

Board of Adjustment is bound in good conscience to consider evidence, to be guided by that alone, and to reach its conclusion with respect to the grant or denial of variance uninfluenced by extraneous considerations which, in other fields, might play in determining purely executive action. It goes on to say

that while strict fules of judicial procedure are not imposed, and the adjustment board is not bound by strict rules of evidence, its judgement must be substantially grounded in competent evidence.

6. Zoning 506 states:

Board of Adjustment which gives no reason or explanation why it rejected testimony of professional engineers and planner, who specialized in traffic engineering and transportation, acted arbitrarily in denying variance. It goes on to say what the board apparently relied upon to deny this application were their own opinions and lay opinions of some 19 objectors (10 were non-residents and 6 had an interest in an area gas station), who testified that if a variance were granted traffic would increase, the character of the town would change, and the town could not economically support another gas station. Not a single professional expert was offered in opposition.

7. Zoning 359 states:

Any zoning official who permits himself to be swayed by favor or prejudice, who yields to influence, political or otherwise, who arrives at a decision otherwise than in conformity to the governing rules of law, and as a reasonable conclusion of the facts before him, is false to the great trust imposed upon him. (Emphasis supplied).

8. Zoning 544 states:

Unless the supporting and explanatory facts, and factual findings or conclusions of an adjustment board respecting variance applications are recited, the reviewing court can not fairly determine whether the board acted properly and within the limits of its authority.

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment to the United States Constitution

STATUTORY PROVISIONS

40:55-32 N.J.S.A.

40:55D-1 N.J.S.A.

40-55D-39 N.J.S.A.

40:55D-54 N.J.S.A.

40:55D-70 N.J.S.A.

STATEMENT OF THE CASE

This case presents many important issues regarding the abuse of police power by a municipality using the technique of ignoring sworn testimony of experts, by promulgating conclusory resolutions, and by being subjected to political pressure from with the board itself. These tactics not only trample on the rights of the applicants to fair and equal justice, but also deny plaintiff's constitutional rights of enjoying peaceful use of its property. Plaintiff/Appellants presented a compelling case for approval, which by any standards met the statutory zoning requirements of the State and the community. The Board chose to make a decision predicated on its own interpretation of testimony elicited. The law division, in its infinite wisdom, stated in two occasions of its opinion, that the Board has the right to selectively accept or reject testimony failing to acknolwedge that expert testimony had been totally ignored in favor of a few trained and programmed objectors. Plaintiff/Appellant suggests that its rights to fair judicial review were

immediately and permanently squelched at this level. Upon appeal to the New Jersey Appellate Court the court mimicked the lower court until, at the end of its opinion, the comment is made that Judge Munkacsi did not address the issue of the resolutions sufficiency. "We agree that the resolution is brief, conclusory, and simply tracks the statutory language. Although we disapprove of conclusory resolutions of this type, we nevertheless affirm because Plaintiff's application was inadequate to establish the use variance requested." The court further goes on to say, "Plaintiffs have failed to establish either the special reasons or negative criteria necessary to grant the variance." In its own opinion, on Page 43, the court states that the board adopted a one page conclusory resolution denying the requested variance because Plaintiffs did not establish special reasons, the variance would adversely affect the neighborhood and be detrimental to the health, safety and welfare of the general public, and the variance would impair the intent and purpose of the zone plan and zoning ordinance. This entire statement by the court is inaccurate and is in direct opposition

to the elicited testimony at the board hearings, so that in the body of the court's decision they are parroting the lower courts decision regarding the Board's resolution, and at the end of their opinion they recognize that the lower courts decision was based on a conclusory resolution which was never addressed by said lower court. The court of appeals further abrogated appellant's rights by promulgating a decisiuon not based on the record elicited, but rather geared toward defending the lower courts decision. The case then proceeded to the Supreme Court of New Jersey for certification, which was summarily denied. Plaintiffs proceeded to the U.S. District Court in the District of New Jersey, and were met with an obvious attempt to clear the calendar of this unimportant case. Not only did the magistrate insist on a motion for dismissal by the defendant's attorney, but he refused to act evenhandedly enough to recommend appellant acting pro se as to action for defense of this motion. During the gestation period of the case, appellant was informed by a court clerk that the judge would not hear oral argument on the motion to dismiss. Appellant strongly countered that comment with a request that

oral argument be heard since a jury trial was now being reduced to a motion hearing. Judge Wolin agreed to hear oral argument with the following admonition, "I don't want to hear anything that's already been submitted repeated (paraphrasing)." Appellant attacked 1. The conclusory resolution and how it violates rights granted under New Jersey law and Federal law, and 2. the disregard for sworn expert testimony by the board, by the lower court, and by the appellate court. The judge dismissed the argument by saying that appellant's rights were not constitutionally violated by not giving them equal justice. In his summary, Appellant recommended that it had received the tappings of justice, but not justice itself, and pleaded with the court to restore the suit and the trial to prove Appellant's case. This was summarily denied.

The Appellants then appealed to the United States Court of Appeals for the Third Circuit, which appeal affirmed the District Court.

REASONS FOR GRANTING

This case rests on the rights of an individual being abrogated for expediency. There are so many violations of court decision, New Jersey law, Federal

law, constitutional law that have been violated by both the State and Federal authorities, that they are too numerous to mention. Only by the intervention of this honorable Court can Appellants' rights be restored and by doing so set precedents for the many thousands of Americans that are bullied by local administrative boards and are powerless against them. We plead the court to review not only this case, but the many principles involved here, which if follower would truly magnify the meaning of equal justice under the law and due process of the law.

CONCLUSION

For all of the above stated reasons, this honorable Court should grant petitioners Writ of Certiorari.

Respectfully submitted,

Richard Sackman, Pro Se

Marilyn Sackman, Pro Se

APPENDIX 1

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

P. Douglas Sisk
Clerk

FOR THE THIRD
CIRCUIT

Telephone
215-597-3143

21400 United States Courthouse
601 Market Street
Philadephia PA 19106-1790

December 21, 1993

Mr. William T. Walsh, Clerk
United States District Court for the District of New Jersey
50 Walnut Street
Martin Luther King, Jr., Federal Building & Courthouse
Newark, NJ 07101

RE: Docket No. 93-5318
Sackman vs. Zoning E Brunswick
D.C. CIV. No. 92-02306

Dear Mr. Walsh:

Enclosed is a cetififed copy of the judgment order in the above-entitled case. The certified judgment order is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

We return herewith the certified record and first supplemental record in the case.

Kindly acknowledge receipt for same on the enclosed copy of this letter.

APPENDIX 2

Counsel are advised of the issuance of the mandate by copy of this letter. A copy of the certified judgment order is also enclosed showing costs taxed, if any.

Very truly yours,
P. DOUGLAS SISK, Clerk

BY: Carolyn Hicks
Deputy Clerk

Enclosure

cc:

Mr. Richard Sackman
Ms. Marilyn Sackman
Andre W. Gruber, Esq.

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-5318

RICHARD SACKMAN;
MARILYN SACKMAN
Appellants

v.

ZONING BOARD OF ADJUSTMENT OF THE
TOWNSHIP OF EAST BRUNSWICK

Appeal from the United States District
Court
for the District of New Jersey
(D.C. Civil No. 92-02306)
District Judge: Honorable Alfred M. Wolin

Submitted Under Third Circuit LAR 34.1(a)
November 3, 1993
Before: MANSMANN, GREENBERG and NYGAARD,
Circuit Judges.

JUDGEMENT ORDER

After consideration of all contentions raised by the appellants, it is

APPENDIX 4

ADJUDGED AND ORDERED that the judgement of the district court be and is hereby affirmed.

Costs taxed against the appellants.

BY THE COURT,

_____
Circuit Judge

Attest:

_____
P. Douglas Sisk, Clerk

Nov 8 - 1993

APPENDIX 5

RICHARD & MARILYN SACKMAN, PRO SE
567 Ryders Lane
East Brunswick, New Jersey 08816
(908) 257-3600
Acting Pro Se
Richard & Marilyn Sackman vs. Zoning Board of Adjustment of the Township of East Brunswick, New Jersey
Docket No. 93-5318

RICHARD & MARILYN SACKMAN	:	UNITED STATES COURT OF APPEALS
	:	CIVIL ACTION NO. 93-5318
Plaintiff (s),	:	
-vs-	:	
ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF EAST BRUNSWICK NEW JERSEY	:	MOTION FOR RE-HEARING OF JUDGEMENT ORDER DATED NOVEMBER 8, 1993
Defendant(s)	:	(Copy Attached)

TO: Mr. P. Douglas Sisk, Clerk
United States Court of Appeals
For the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106-1790

In accordance with FRAP 40, Paragraph 9.5.1 we appeal from the courts decision a question of exceptional importance that since the outset of this

case from administrative board until this order, Appellants have been denied rights predicated under the Constitution, repeatedly requested for trial by jury of peers from a judgement by a Quasi-Judicial panel which totally abrogated Appellant's civil rights.

It is with deep regret that Appellant petitioners find themselves frustrated by a system which perpetuates injustice and denies basic rights granted under the Constitution of the United States. appellant petitioners are aware of the heavy load the courts must bear and sympathize with the obvious problem, however, this case represents many issues beyond zoning which must be addressed, i.e.:

1. Denial of rights to juris prudence.
2. Resolution founded on no facts presented by oral or written information during Quasi-Judicial hearing.

3. Court orders and judgments predicated on supposition not related to facts presented.
4. Denial of jury trial by District Court founded on a suggestion not contemplated by the Defendant.
5. A totally irrational finding that the subject p[roperty represents any threat or dimunition of property values to the community as a whole.
6. It is Appellants inherent right to a fair and impartial hearing before a jury of its peers. Appellants would be satisfied to rely on that judgment.

The courts because of their busy schedule and volume and their anxiety to move cases along that are apparently of no great moment have denied Appellants

rights inherent in the Constitution. The courts have abrogated their responsibility to fairness and impartiality.

It is, therefore, respectfully requested that this case be re-heard by the court.

Respectfully,

_____
RICHARD SACKMAN, PRO SE

_____
MARILYN SACKMAN

Dated: November 22, 1993

APPENDIX 9

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS

P. Douglas Sisk
Clerk

FOR THE THIRD CIRCUIT

Telephone
215-597-3143

21400 United States
Courthouse
601 Market Street
Philadelphia PA 19106-1790

December 17, 1993

(Mr. Richard Sackman
(Ms. Marilyn Sackman
567 Ryders Lane
East Brunswick, NJ 08816

RE: Docket No. 93-5318
Sackman vs. Zoning E Brunswick
D.C. Civil No. 92-02306

Dear Mr. and Mrs. Sackman:

Enclosed herewith is copy of Order filed today in the above captioned appeal.

Very truly yours,
P. DOUGLAS SISK, Clerk

By: Carolyn Hicks
Deputy Clerk

cc:
Andre W. Gruber, Esq.

APPENDIX 10

December 3, 1993

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 93-5318
Richard & Marilyn Sackman, Appellants
vs.
Zoning Board of East Brunswick

Present: MANSMANN, GREENBERG AND NYGAARD, Circuit Judges

1. Motion by Appellants to Reconsider order dated 11/15/93 denying motion for oral argument.

For your information the Judgement order was entered 11/8/93.

Carolyn Hicks, Deputy
Clerk
Direct Dial 597-3143

ORDER

The foregoing Motion is denied.

By the Court,

APPENDIX 11

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
ALFRED M. WOLIN
JUDGE

MARTIN LUTHER KING JR.
FEDERAL BUILDING & U.S.
COURTHOUSE
50 WALNUT ST., ROOM 4069
P. O. BOX 999
NEWARK, NJ 07101-0999

April 29, 1993

LETTER OPINION AND ORDER - NOT FOR
PUBLICATION
ORIGINAL FILED WITH THE CLERK OF
THE COURT

Mr. & Mrs. Richard Sackman
567 Ryders Lane
East Brunswick, NJ 08816

Andre W. Gruber, Esq.
3086 Route 27, Suite 1
Box 8
Kendall Park, NJ 08824-0009

Re: Sackman v. Zoning Board of Adjustment of the Township of East Brunswick
Civil Action No. 92-2306

Dear Mrs. Sackman and Gentlemen:

This matter comes to the Court on the motion of defendant, the Zoning Board of Adjustment of the Township of East Brunswick ("Township" or "Board"), to dismiss plaintiffs' amended complaint for failure to state a claim upon which relief can be granted and for

lack of subject matter jurisdiction. In the alternative, defendant motions the Court for summary judgement. The Court decided this matter based on the parties' submissions and oral argument. For the reasons provided, the Court will grant summary judgement for the defendant on plaintiffs' due process and takings claims.

BACKGROUND

A. Procedural History and Facts

In October, 1988, plaintiffs Richard and Marilyn Sackman purchased property identified as Lot 10.07, Block 319 on the tax map of East Brunswick, commonly known as 567 Ryders Lane, East Brunswick, New Jersey. In December, 1988, plaintiffs applied to the Zoning Board for a use variance to convert the single-family dwelling into an office. The property was located in a residential zone, or R-3. The Zoning Board held public hearings on plaintiffs' application on January 18, 1989, March 13, 1989, April 10, 1989 and May 1, 1989.

Members of the community voiced objection to the Sackman's application. Plaintiffs presented testimony

of four witnesses in addition that of Richard Sackman. A real estate broker testified that the property could not be sold as residential property. This testimony was vigorously challenged, however, on the basis that the property had been priced too high to permit sale within a reasonable time. Second, a real estate appraiser testified on the issue of how surrounding property values would be affected if the variance were granted. Third a planner expressed his opinion that the property is best suited for an office and that the issuance of the use variance would not impair the intent of the zoning ordinance or master plan. Finally, a civil engineer offered testimony of plans to landscape the property in a manner to preserve the residential nature of the building.

A resolution dated June 5, 1989 was issued by the Township which denied the Sackmans' application for the use variance.

Plaintiffs appealed to the Superior Court of New Jersey, Law Division, Middlesex County, and a trial was

held. The Superior Court sustained the Township's decision in a judgement dated August 21, 1990.

Plaintiffs appealed to the Appellate Division, Case No. A-991-90T1, which was argued on December 4, 1991. On January 6, 1992, the Appellate Division issued its opinion which affirmed the decision of the superior Court.

Plaintiffs then appealed with a Notice of Petition for Certification to the New Jersey Supreme Court. The appeal requested that the matter be heard and that the decision of the Appellate Division be reconsidered. Certification and reconsideration were denied on March 5, 1992.

Plaintiffs filed a complaint and amended complaint with this Court alleging that their constitutional rights were violated by the Township and by the New Jersey state courts. The Court considers this matter in part as a motion to dismiss, and, in part, as a motion for summary judgement by defendant.

APPENDIX 15

DISCUSSION

The Sackmans' amended complaint alleges two constitutional violations. Specifically, plaintiffs contend that their constitutional right to due process was violated because the New Jersey courts denied plaintiffs full judicial review of the record; the Zoning Board and court hearings were not impartial; and the zoning ordinance reflects an arbitrary and unreasonable restriction on use of plaintiffs' property. The Sackmans augment their due process challenge by alleging that the New Jersey court system denied them a full review of the record because of the presumption of validity accorded zoning boards. Second, the Sackmans allege a violation of the Takings Clause as incorporated in to the Fourteenth Amendment based on the Township's denial of plaintiffs' requested use variance.

A. The Standard for a Motion to Dismiss Pursuant to Rule 12(b)(6)

In determining whether a complaint should be

dismissed for failure to state a claim pursuant to 12(b)(6), the court must limit its consideration to the facts alleged in the complaint. Biesenbach v. Guenther, 588 F2d 300, 302 (3d Cir. 1978). Moreover, in its examination of the complaint, the Court is required to accept all of the allegations contained therein and all inferences arising therefrom as true. Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984). Unless plaintiff can prove no set of facts in support of his claim that would entitle him to relief, his complaint should not be dismissed. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957); D.P. Enterprises v. Bucks County Community College, 725 F.2d 943 944 (3d Cir. 1984).

Defendant moves alternatively for summary judgement.

B. The Standard for Summary Judgement

Summary judgement shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

a judgement as a matter of law." Fed. R. Civ. P. 56(c); see Hersh v. Allen Products Co., 789 F.2d 230, 232 (3d Circ. 1986). In making this determination, a court must draw all reasonable inferences in favor of the non-movant. Meyer v. Riegel Prods. Corp., 720 F.2d 303, 307 n.2 (3d Circ. 1983), cert. denied, 465 U.S. 1091, 104 S. Ct. 2144 (1984). Whether a fact is "material" is determined by the substantive law defining the claims. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986); United States v. 225 Cartons, 871 F.2d 409, 419 (3d Circ. 1989).

"[A]t the summary judgment state the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249, 106 S. Ct. at 2511. Summary judgement must be granted if no reasonably trier of fact could find for the non-moving party. Id.

When the non-moving party will bear the burden of proof at trial, the moving party's burden can be

discharged by 'showing' -- that is, pointing out to the District Court -- that there is an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986). If the moving party has carried proof at trial, the moving party's burden can be discharged by 'showing'--that is, pointing out to the its burden of establishing the absence of a genuine issue of material fact, the burden shifts to the non-moving party to "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986). When the non-moving party's evidence in opposition to a properly-supported motion for summary judgement is merely "colorable" or "not significantly probative," the Court may grant summary judgement. Anderson, 477 U.S. at 249-50, 106 S. Ct. at 2511. Further, when a non-moving party who bears the burden of proof at trial has failed, in opposition to a motion for summary judgement, to raise a disputed fact issue as to any essential element of

his or her claim, summary judgement should be granted because "a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. Celotex, 477 U.S. at 322-23, 106 S. Ct. at 2552.

In opposing summary judgement, a non-movant may not "rest upon mere allegations, general denials, or...vague statements." Quiroga v. Hasbro, Inc., 934 F.2d 497, 500 (3d Cir.), cert. denied, 112 S. Ct. 376 (1991); Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990) ("unsupported allegations in [a non-movant's] memorandum and pleadings are insufficient to repel summary judgement"); see Fed. R. Civ. P. 56(e). The summary judgment procedure enables a party "who believes there is no genuine issue as to a specific fact essential to the other side's case to demand at least one sworn averment of the [specific] fact before the lengthy process of litigation continues." Lujan v. National Wildlife Federation, 110 S. Ct. 3177, 3188-89 (1990). The "unsupported

statements of counsel in memorandum submitted to the court are even less effective in meeting the requirements of Rule 56(e) than are unsupported allegations in the pleadings." Schoch, 912 F.2d at 657.

The Sackmans submitted an affidavit in opposition to defendant's motion for summary judgment. See Plaintiffs' Response to Notice of Motion to Dismiss. The standards governing this Court's review of the affidavit are clear.[1]

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[1] An affidavit filed in opposition to a properly supported motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A non-movant "is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit." Lujan, 110 S. Ct. at 3188. The Court is not to presume the existence of specific facts from general averments. Id. Such an affidavit must: (1) "show affirmatively that the affiant is competent to testify to the matters stated therein;" (2) be based on "personal knowledge'" and (3) establish facts that "would be admissible at trial." Fed. R. Civ. P. 45 (3); see Hlinka v. Bethlehem Steel Corp., 863 F.2d 279, 282 (ed Cir. 1988). In sum, an affidavit offered in opposition to a motion for summary judgment must establish a proper

meet the aforementioned standards. In short, their affidavit fails to allege facts other than the conclusory allegations already submitted in their complaint. As a result, this Court did not consider the affidavit in its disposition of the current motion.

c. Due Process

The Sackmans allege that their Fourteenth Amendment substantive and procedural due process rights have been violated. The plaintiffs' claim under the Due Process Clause is coextensive with their claim under the Takings Clause, which protects against

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evidentiary foundation for the facts stated within it. Williams v. Borough of West Chester, 391 F.2d 458, 471 (3d Cir.1989 (Garth, J., concurring). Affidavits that fail to satisfy these requirements "may not be considered" on a motion for summary judgement. Hlinka, 863 F.2d at 282-83. Moreover, "[w]hen, without a satisfactory explanation, a non-movant's affidavit contradicts earlier deposition testimony, the district court may disregard the affidavit in determining whether a genuine issue of material fact exists." Hackman v. Valley Fair, 932 F.2d 239, 241 (3d Cir. 1991); see also Martin v. Merrell Dow Pharmaceuticals, Inc., 851 F.2d 703 (3d Cir. 1988).

arbitrary use of government power. Plaintiffs' argument is essentially that the Zoning Board hearing process was not impartial, the Township's actions were arbitrary and capricious, and the New Jersey state courts denied plaintiffs a full judicial review of the record.

1. State Law Standards for Township Board Hearing Procedures

The legal standards governing Zoning Board decisions are clear. A Board of Adjustment has authority to grant a variance and permit nonconforming use of zoned property pursuant to N.J.S.A. 40:55D-70D. This statute confers upon a Board the following power:

> [G]rant a variance to allow departure from regulations pursuant to article 8 of the act to permit" (1) a use or a principal structure in a district restricted against such use or principal structure, (2) an expansion of a nonconforming use....A variance under this subsection shall be granted only by affirmative vote of at least five members, in the case of a municipal board... pursuant to article 10 of this act.
>
> No variance or other relief can be granted under the terms of this section unless such variance or other relief can be granted without substantial

> detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.

N.J.S.A. 40:55D-70d (1991).

This statute has been consistently interpreted to require a board of adjustment to make two findings: (1) Under the positive criteria, special reasons must exist for the variance; and (2) the negative criteria require proof that the variance may be granted without substantial detriment to the public good and without substantial impairment of the intent and purpose of the zone plan and zoning ordinance. Burbridge v. Mine Hill Twp., 117 N.J. 376, 384-85 (1990). See also Kohl v. Mayor of Fair Lawn, 50 N.J. 268, 276 (1967); Sica v. Board of Adjustment, Sea Girt, 127 N.J. 152, 156 (1992).[2]

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[2] The plaintiffs' claim of lack of full and impartial review by the Board and the New Jersey state courts is not barred by the doctrine of res judicata because this Court is not adjudging the merits of the Sackmans' variance application. Rather, this Court addresses the propriety of the application and review procedure under the guise of a constitutional due process claim.

APPENDIX 24

(a) Positive Criteria: Proof of Special Reasons

The "special reasons" standard has been defined as a purpose that inherently serves the general welfare in a particular community.[3] Medici v. BPR Co., 107 N.J. 1, 18 (1987). The New Jersey Supreme Court has articulated under what circumstances a general welfare finding must be made:

> [Where] the use is not of the type which we have held of itself provides special reasons, such as a school or hospital, there must be a finding that the general welfare is served because the use is peculiarly fitted to the particular location for which the variance is sought.

Id. at 16 (citing Kohl v. Mayor and Council of Fair Lawn, 50 N.J. 268, 279 (1967). In Medici, the New Jersey Supreme Court provided that proof of undue hardship would also satisfy the "special reasons" requirement. Medici, 107 N.J. at 17 n.9. Undue hardship exists when the property is not reasonably adaptable to a conforming use.[4]

(b) Negative Criteria: Lack of Substantial Detriment and Substantial Impairment

The "negative criteria" portion of the analysis requires an enhanced quality of proof that the variance is not consistent with the intent and purpose of the master plan and zoning ordinance. Medici, 107 N.J. at 22. The plaintiffs' proof must satisfactorily reconcile the grant of a use variance with the ordinances continued omission of the proposed use from those permitted in the zone. Id. at 4. The Board is required to evaluate the impact of the proposed variance upon the adjacent properties and determine whether or not it will cause such damage to the character of the neighborhood as to constitute

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[3] The Supreme Court has noted the following about the term "general welfare":

> The concept of public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as

"substantial detriment to the public good." Sica, 127 N.J. at 163 (citing Medici, 107 N.J. at 22 n.12). Thus, the Board must weigh the benefits from the grant of the variance against the detriment to the public good.[5]

The legislature empowered Boards of Adjustment to make zoning decisions based on the fact the local people--knowledgeable and familiar with the community's characteristics and interest--are best suited to assess the merits of a variance application. Ward v. Scott, 16 N.J. 16, 23 (1954); Medici, 107 N.J. 1 (1987). Furthermore, a Board is free to accept or reject the opinions of a planner proffered by an applicant or objector. Allen v. Hopewell Twp. Zoning Board, 227 N.J. Super 574 581 (app. Div.), certif. denied, 113 N.J. 655 (1988).[6] Thus, plaintiffs'

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healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Berman v. Parker, 348 U.S. 26, 32, 75 S. Ct. 98, 102 (1954).

contention that the Board arbitrarily rejected the conclusions of plaintiffs' expert planner is without legally contestable grounds and does not constitute a constitutional argument to be considered by this Court. It is not for the state court to second guess the Board in its exercise of discretion, particularly when that discretion included the evaluation of testimony from four public hearings. Again, the Court reminds plaintiffs that it does not consider the merits of plaintiffs' variance application; rather it assesses the constitutionality of the application review procedure.

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[4] Plaintiffs contend that they have met the "special reasons" burden of proof through the presentation of witnesses who testified that the use would not adversely affect the community and would not impair the intent of the master plan. In addition, plaintiffs' expert testified that the property would be best used as a commercial enterprise. Zoning Board Transcript, March 13, 1989, p. 20. However, the transcripts reveal significant challenges by members of the community. The Board evaluated the testimony presented at four separate hearings and concluded that the plaintiffs failed in their burden of proof.

APPENDIX 28

The prevailing standard for determining whether the negative criteria have been satisfied depends on the effect a variance would have on the public good and on the intent and purpose of the zoning plan. The Township concluded that a variance in this case would be detrimental to the health, safety and welfare of the community, and that it would substantially impair the intent and purpose of the zone plan and zoning ordinance. This conclusion was based on the testimonial evidence presented to the Board and on the Board's special knowledge of the character of the community.[7] Thus, the basis for this conclusion was sufficient under New Jersey case law. See Medici.

Because the use was not a hospital or school, the board properly concluded the proposed use was not inherently beneficial. Moreover, the plaintiffs were not persuasive in attempting to prove that the property is particularly suited for their proposed use. The Board further concluded that the character of the neighborhood would be altered and that a use variance in this case would be detrimental to the health, safety and welfare of the community.

107 N.J. 1 (1987) (If a board's decision comports with the statutory criteria and is founded on adequate evidence, its exercise of discretion shall be sustained.).

Review of a Board of Adjustment decision denying a use variance is accorded a presumption of validity and is reversible only if arbitrary, capricious and unreasonable. Kramer v. Board of Adjustment, Sea Girt, 45 N.J. 268, 296 (1965); Sica, 127 N.J. 152, 166 (1992). The basis for the presumption "is the recognition that boards possess special knowledge of local conditions and must be accorded wide latitude in

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In addition, the Board found a lack of undue hardship on plaintiffs' part because the property has a viable alternative use as a residence. The property is also marketable as a residence. The Board drew these conclusions from testimony, including that of Richard Sackman himself.

This Court does not directly address these arguments. These arguments were submitted to the Board and to the Superior Court of New Jersey in the review process. The question before this Court is whether the zoning Board system is constitutionally deficient.

The court finds inadequate support in the record for the Sackmans' contention that the conversations of a Board member with members of the community constituted a plot to wrongfully deny them a variance.

the exercise of their discretion." Sica 127 N.J. 152, 167 (citing Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965)). A court cannot substitute an independent judgement for that of the Board's in areas of factual disputes; neither will they exercise anew the original jurisdiction of such boards. Medici, 107 N.J. 1, 15 (citing Kramer v. Bd. of Adjustment, 45 N.J. 268, 296 (1965)).[8] Thus, a state court's review of the Zoning Board decision denying plaintiffs' use variance application is limited to a determination whether the decision as arbitrary, capricious and unreasonable based on the evidence presented to the Board.

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[5] The Board's resolution, although brief, indicates that they have reviewed the master plan, and that the proposed use if incompatible with a grant of variance. The plaintiffs contend that their proposed use is consistent with the "old" master plan. However, the master plan clearly indicates the subject property is zoned residential, or R-3. The revised master plan of November, 1990 continues the residential classification and also permits a multi-family residential use if there is at least 40 acres of land known as VG-III option. Thus the plaintiffs are mistaken in their interpretation of the zoning map of East Brunswick; the proposed use is inconsistent with the intent of the zoning ordinance and master plan.

The Sackmans fail to produce any evidence that the Board exercised its review in a constitutionaly deficient manner. As a result, the Court grants summary judgment for defendant on plaintiffs' due process challenge to the Zoning Board hearing and state court review procedures.

At oral argument and in their submissions, the Sackmans argued that the Board resolution was brief and conclusory. Their comment on this point is not devoid of merit. A more-detailed resolution may have been of significant assistance in satisfying the Sackmans and in persuading them to accept the Board's decision. Information such as that contained in footnote 7 of this opinion would have been persuasive in this matter.

6 At oral argument, the Sackmans alleged that the Board should have presented experts to reject the opinions given by the plaintiffs' witnesses. A Zoning Board of Adjustment is not obligated to go point-counterpoint with a variance applicant. The Board's role is to listed and evaluate evidence presented to it. From the record before the Court, the Board performed this task. Thus, plaintiffs' argument fails.

7 Board member Alvarez placed special emphasis on the fact that this neighborhood has not undergone a change since the adoption of the master plan and zoning ordinance, and that this is a significant factor to consider when evaluating a use variance application. Zoning Board Transcript, May 1, 1989, p. 32.

2. Substantive Due Process

Substantive due process protects a general right of an individual to be free from the abuse of government power. Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973), cert. denied, 474 U.S. 1033, 94 S. Ct. 462 (1973). To prevail on a due process claim, plaintiffs must demonstrate that the Township arbitrarily and capriciously deprived them of a protected property interest, and that the state procedures for challenging that depravation do not comport with due process. Taylor Investment, Ltd. v. Upper Darby Twp., 983 F.2d 1285, 1292-93 (3d Cir. 1993). Where, as here, a property right is involved, the test for determining whether a law comports with substantive due process is whether the law is rationally related to a legitimate government interest.

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8 At oral argument and in their submissions, the Sackmans argued that the Superior and Appellate Courts of New Jersey did not sufficiently develop the record. The Court finds the record is legally sufficient. As a practical matter, however, a more thoroughly developed resolution would have been helpful.

Midnight Sessions Ltd. v. City of Philadelphia, 945 F.2d 667, 682 (3d Cir. 1991) (citing Rogin v. Bensalem Twp., 616 F.2d 680, 689 (3d Cir. 1980), cert. denied, 450 U.S. 1029, 101 S. Ct.1737 (1981)).[9] A federal court will largely defer to a legislature's judgment rather than substitute its own judgment in cases involving land use policy because the Court does not wish to "undermine the legitimacy of democratic decision making unless the local legislative judgement is without a plausible rational basis." Midnight Sessions, 945 F.2d at 682-83 (quoting Pace Resources, Inc. v. Shrewsbury Twp., 808 F.2d 1023, 1035 (3d Cir. 1987), cert. denied, 482 U.S. 906, 107 S. Ct. 2482 (1987)).[10]

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[9] The Court recognizes that the proper analysis for a contested property right is a rationality review, whereas an alleged due process violation of a fundamental right necessitates a strict scrutiny analysis.

[10] The Court recognizes that the state legislature grants authority to municipalities to create zoning boards. The mayor appoints members to the board, and thus, the board acts under the auspices of the

APPENDIX 34

Plaintiffs' complaint must allege facts that would support a finding of arbitrary or irrational action by the Township. See Pace Resources, 808 F.2d at 1035. The Sackmans' complaint fails to make any factual allegations that indicate irrationality. This case simply involves a difference of opinion on how much commercial use is in the best interest of the Township. The case law demonstrates that this Court should follow the opinion of the legislature and executive unless the Sackmans give the Court a constitutional reason to disturb it. Plaintiffs' complain alleges no facts suggesting arbitrariness or abuse of power. Accordingly, the Court will not disturb the zoning board decision. Plaintiffs' substantive due process claim cannot withstand the defendant's motion for summary judgment.

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executive branch of government. Moreover, the legislature encourages municipalities to make zoning decisions by ordinance rather than by variance. Medici, 107 N.J. at 5.

3. Procedural Due Process

The basic elements of procedural due process are notice and opportunity to be heard. Fuentes v. Shevin, 407 U.S. 67, 80, 92 S. Ct. 1983 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S. Ct. 1820 (1969). Plaintiffs' complaint reveals that, in every instance, they received notice and a hearing. Indeed, the record confirms that the Sackmans received four Zoning Board hearings. At that time, they were permitted to produce four witnesses. In addition, the New Jersey Superior and Appellate Courts reviewed the Sackmans' case.[11] Under these circumstances, the only question this Court may consider is whether the action of the zoning commission was arbitrary and capricious and has no substantial relation to the general welfare. South Gwinnett Venture v. Pruitt, 491 F.2d 5, 7 (5th Cir.) (en banc), cert. denied, 419 U.S. 837, 95 S. Ct.

[11] The only procedure denied to plaintiffs was the Supreme Court of New Jersey's unwillingness to grant certification. Certification is a discretionary devised used by the New Jersey Supreme Court to choose the cases it wishes to hear. Thus, the denial of plaintiffs' petition for certification does not make out a cause for violation of procedural due process.

66 (1974). The court largely performed this review under the rubric of substantive due process in the previous section. As a result, the defendan's shall be granted summary judgment on plaintiffs' procedural due process claim.

D. The Takings Claim

The Fifth Amendment guarantees that private property shall not "be taken for public use, without just compensation." U.S. Const., amend. V. The Fifth Amendment is applicable to the states through the Fourteenth Amendment's Due Process Clause. Regulations restricting the use of property may in some limited circumstances amount to a taking. The Sackmans allege that the zoning regulation that prohibits commercial use of their property effects a taking under the Fifth and Fourteenth Amendments. No precise rule determines when property has been taken, and thus, a weighing of private and public interests is appropriates. Agins v. City of Tiburon, 447 U.S. 255, 261, 100 S. Ct.2138,

2141 (1980).

A "taking may be more readily found when the interference with property can be characterized as a physical invasion by government...than when the interference arises from some public program adjusting the benefits and burdens of economic life to promote common good." Penn Central Transp. Co. v. N.Y. City, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659 (1978). In the present matter, the township did not contemplate a physical invasion of plaintiffs' property, but a restriction on use. In circumstances where the local government reasonably concluded that the health, safety or general welfare would be promoted by prohibiting a particular contemplated use, the Supreme Court has upheld restrictions that destroyed or adversely affected recognized real property interests. Penn Central, 438 U.S. at 126, 98 S. Ct. at 2659. In such circumstances, diminution in value is one factor to consider in determining whether a taking has occurred. Keystone Bituminous Coal Ass'n v. Duncan, 771 F.2d 707,

713 (3d Cir. 1985), aff'd, 480 U.S. 470, 107 S. Ct. 1232 (1987). Second, the Court must determine the extent that the regulation interferes with reasonable investment-backed expectations. Penn Central, 438 U.S. at 124, 98 S. Ct. at 2659.

To prove that a zoning board's exercise of their regulatory power was a taking, a plaintiff must show that the governmental action does not advance a legitimate public interest. Pace Resources, Inc. v. Shrewsbury Twp., 808 F.2d 1023 (3d Cir. 1987), cert. denied, 482 U.S. 906, 107 S. Ct. 2482 (1987). This is a heavy burden because the government action is accorded a presumption that it advances the public interest. Id. Neither deprivation of the most beneficial use of land nor a severe decrease in the value of the property along establish an unlawful taking. Nasser v. City of Homewood, 671 F.2d 432, 438 (11th Cir. 1982). Moreover, a taking is not established simply by showing "the denial of the ability to exploit a property interest that the

[plaintiffs] heretofore had believed was available." Penn Central, 438 U.S. at 130, 98 S. Ct. at 2662 (finding denial to use air rights to build office tower leaves other reasonable beneficial uses of site, and therefore, there is insufficient interference with investment-backed expectations).

Here, the Sackmans allege that the Township's residential restriction on the subject property constitutes a taking. The Sackmans base their contention on the testimony of a planner who offered the opinion that the property is suitable as an office. Zoning Board Transcript, March 13, 1989, p. 20. Testimony of a planner is not sufficient to satisfy the plaintiffs' burden of proof. See, e.g., Allen v. Hopewell Tp. Zoning Board, 227 N.J. Super. 574, 581 App. Div.), certif. denied, 113 N.J. 655 (1988); see also Medici, 107 N.J. at 21 n.11. The Court concludes that there is an absence of evidence to support a claim or arbitrary or capricious use of government power, and thus, no taking occurred. The Sackmans bought and own

a residential piece of property, and the Township has taken no action to diminish the value of the existing property right. The denial of the nonconforming use variance does not cause plaintiffs irreparable harm. To the contrary, plaintiffs have use of the property as a residence. Plaintiff Richard Sackman stated at a zoning hearing that if he were denied the requested nonconforming use the premises would be used as a residence by his adult children. Zoning Board Transcript, January 18, 1989, p. 39.

The Township denied plaintiffs' requested use in order to advance the community welfare and character of the neighborhood. The zoning regulation at issue here exercises the Township's police power to protect residents of East Brunswick from the ill effects of commercialization. such governmental purposes have long been recognized as legitimate. See Penn Central, 438 U.S. at 129, 98 S. Ct. at 2662; Agins v. City of Tiburon, 447 U.S. 255, 261, 100 S. Ct. 2138, 2142 (1980).

Purchasing the subject property and the subsequent application for a use variance does not evidence a reasonable, investment-backed expectation but, rather, a business gamble. Habersham v. Fulton County, 632 F. Supp. 815, 823 (N.D. Ga. 1985), aff'd 791 F.2d 170 (11th Cir. 1986). The Court finds that the Sackmans lacked a legitimate expectation that the property would be rezoned for office use as sought. Clearly, no taking has occurred. As a consequence, this aspect of plaintiffs' case does not withstand the defendant's motion for summary judgment.

CONCLUSION

For the reasons stated, this Court will grant defendant's motion for summary judgement on plaintiff's constitutional due process challenge to the hearing and review proceedings and on the takings claim. No other

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; matter is dismissed.

Very truly yours,

ALFRED M. WOLIN
U.S.D.J.

AMW:bv

It is SO ORDERED this 29th day of April, 1993.

ALFRED M. WOLIN, U.S.D.J.

APPENDIX 42

SUPREME COURT OF NEW JERSEY
C-865 September Term 1991
34,951

RICHARD SACKMAN, et al.,

Plaintiffs-Petitioners

v. ON PETITION FOR CERTIFICATION

ZONING BOARD OF ADJUSTMENT OF
THE TOWNSHIP OF EAST BRUNSWICK,

Defendant-Respondent.

To the Appellate Division, Superior Court:

A petition for certification of the judgement in A-991-90T1 having been submitted to this Court, and the Court having considered same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 12th day of May, 1992.

CLERK OF THE SUPREME COURT

Certified as a true copy and issued in lieu
of a formal mandate on December 21, 1993.

Teste:

Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX 43

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-991-90T1

RICHARD SACKMAN and

MARILYN SACKMAN, His Wife,

Plaintiffs-Appellants,

v.

ZONING BOARD OF ADJUSTMENT

OF THE TOWNSHIP OF EAST

BRUNSWICK,

Defendant-Respondent.

Argued December 4, 1991 - Decided

Before Judges King, Dreier and Gruccio.

On appeal from Superior Court, Law Division, Middlesex County.

Appellant Richard Sackman argued the cause for appellants pro se.

Andre Wm. Gruber argued the case for respondent.

APPENDIX 44

PER CURIAM

Plaintiffs Richard and Marilyn Sackman appeal from a judgment of the Superior Court, Law Division, upholding defendant Zoning Board of Adjustment of the Township of East Brunswick's (Board) denial of a use variance which would have allowed them to use an existing one-family home, zoned for single-family residential use, as a commercial office. Plaintiffs contend that the Board's resolution was sufficient, it acted arbitrarily, capriciously and unreasonably in denying the variance.

Plaintiffs applied for a variance to use an existing single-family home at 567 Ryders Lane in East Brunswick as an office and to permit parking in the front yard. Following hearings before the Board, it unanimously voted to deny the requested use variance. On June 5, 1989, the Board adopted a one-page conclusory resolution denying the requested variances because plaintiffs did not establish special reasons,

the variance would adversely affect the neighborhood and be detrimental to the health, safety and welfare of the general public, and the variance would impair the intent and purpose of the zone plan and zoning ordinance.

The property in question was constructed as a single-family home and was used for that purpose until plaintiffs purchased it in 1988 and applied for a use variance to convert it into an office for their medical consulting and recruiting business. Plaintiffs used the property as an office prior to the Board hearings. The property is improved with a three-bedroom, 1,198 square-foot brick ranch home with attached two-car garage.

Robert Hyer, plaintiffs' appraisal expert, described the home as "a fine dwelling of custom materials." The land measures 140' x 300' and fronts on the west side of Ryders Lane, which is a country road. The property is bordered on its south and west

sides by an oversized lot owned by John Gatarz, which includes a residence, an excavating business and undeveloped areas. Gatarz stores dirt and construction equipment on his land. To the north, the property is bounded by two homes, which front on Guernsey Lane. Garden apartments, the municipal office complex and a commercial nursery are located across Ryders Lane.

The property is zoned R-3 (single-family residential) with a VG-III overlay, which provides for multifamily housing and a cluster option for single-family housing applicable to parcels of 40 acres and over. All of the properties in the immediate area are also zoned R-3, except for the garden apartments and municipal complex, which are zoned OI. The Gatarz property and commercial nursery are prior nonconforming uses.

At oral argument, we were provided with maps, drawings and photographs of the area in question.

The zoning ordinance requirement for parking was complied with after changes were implemented to comply

with country and municipal requirements and a neighbor lodged an objection. Notwithstanding this accommodation, there was general local dissatisfaction with the plan. Plaintiffs produced a planner who testified that the property was not suitable for a single-family home; was compatible with the commercial uses nearby; would draw only minimal traffic; would meet all bulk requirements; would promote the general welfare and the municipal land use law; and was compatible with the widening and realignment of Ryders Lane, which has changed the neighborhood. Plaintiffs also produced a Realtor who opined that the property was not realistically residential because of its location, nearby uses and traffic. In support of this contention, he cited that the property had been sporadically on the market from 1985 to 1989. Other testimony indicated that the plaintiff paid too much for the property and that because of the VGIII option, multi-family developments in the area were probable.

In opposition, neighbors testified that any

hardship was self-created; no special reasons existed for the variance; and that granting the variance would be deleterious to the neighborhood and the zoning plan. The Board decided, in a conclusory resolution, that no special reasons were established; that other commercial uses were pre-existing; that the property could be used as a residence (plaintiffs admitted that if the variance was denied, their children would use the property as a residence); that a variance would undermine the master plan, changing the neighborhood's character; and that a variance would adversely affect the value of adjoining and nearby properties. The Board's resolution set forth the aforementioned reasons for the denial.

On appeal, the Superior Court judge sustained the Board. She concluded that the Board's action was not arbitrary, unreasonable or capricious; that the plaintiffs failed to establish special reasons and did not meet the enhanced negative criteria standard of

Medici v. BPR Co., 107 N.J. 1 (1989). She also found the proposed use would undermine the intent and purpose of the zone plan and ordinance.

Our review of this record indicates that Judge Munkacsi's decision was correct and we affirm essentially for the reasons expressed by her in her letter opinion of August 6, 1990. Judge Munkacsi did not address the issue of the resolution's sufficiency. We agree that the resolution is brief, conclusory and simply tracks the statutory language. Although we disapprove of conclusory resolutions of this type, we, nevertheless, affirm because plaintiffs' application was inadequate to establish the use variance requested. Plaintiffs have failed to establish either the special reasons or the negative criteria necessary to grant the variance.

Affirmed.

APPENDIX 50

ANDRE WM. GRUBER, ESQUIRE
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P. O. Box 8
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201-297-7600
Attorneys for Defendant Zoning Board
of Adjustment of the Township of
East Brunswick

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MIDDLESEX COUNTY
DOCKET NO. W-019027-89

RICHARD SACKMAN and MARILYN SACKMAN, His Wife,	:	
Plaintiff	:	
vs.	:	CIVIL ACTION
ZONING BOARD OF ADJUSTMENT OF THE TOWNSHIP OF EAST BRUNSWICK	:	JUDGEMENT
Defendant	:	

THIS MATTER having been opened to the Court by James H. Rollyson, Esquire, attorney for plaintiff Richard Sackman and Marilyn Sackman; and Andre Wm. Gruber, Esquire, attorney for defendant Zoning Board of

Adjustment of the Township of East Brunswick and the Court having considered oral argument, the exhibits and the briefs filed in support of and in opposition to the Complaint, and good cause having been shown,

IT IS on this 21st day of August, 1990, ORDERED AND ADJUDGED that the plaintiff is hereby denied a use variance to use the property known as Block 319, Lot 10.07, 567 Ryders Lane, East Brunswick, New Jersey, to convert an existing single family dwelling to an office; and further

ORDERED AND ADJUDGED that plaintiffs have failed to prove special reasons or establish negative criteria to compel the Zoning Board of Adjustment of the Township of East Brunswick to grant said use variance; and further

ORDERED AND ADJUDGED that the defendant Zoning Board of Adjustment of The Township of East Brunswick's denial of the plaintiff's

application for a use variance was not arbitrary, capricious and unreasonable, and accordingly, said decision is hereby upheld; and further

ORDERED AND ADJUDGED that no costs are assessed to either party.

JOYCE E. MUNKACSI, J.S.C.

APPENDIX 53

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
JOYCE E. MUNKACSI MIDDLESEX CO. COURT HOUSE
JUDGE NEW BRUNSWICK, NJ 08903

August 6, 1990

James H. Rollyson, Esquire
44 Ryders Lane
Post Office Box 313
East Brunswick, New Jersey 08816

Andre Wm. Gruber, Esquire
Post Office Box Eight
3086 Route 27, Suite One
Kendall Park, New Jersey 08824-0008

Re: Richard and Marilyn Sackman v. Zoning Board of Adjustment of the Township of East Brunswick

Dear Counsel:

This is an action in lieu of prerogative writs in which plaintiffs appeal from a decision of the defendant Zoning Board of Adjustment of the Township of East Brunswick denying their application for a use variance to convert an existing single family dwelling to office use.

APPENDIX 54

The plaintiffs, Richard Sackman and Marilyn Sackman, are the owners of the premises commonly known as 567 Ryders Lane in East Brunswick, New Jersey and designated as Block 319, Lot 10.07 on the tax maps of East Brunswick. They are currently operating a medical consulting business from that location in violation of the municipal zoning ordinances.

The zoning for the site is R-3 residential with a VG III (Village Green) option. This option permits multi-family residents and would apply if there was 40 acres or more. The zoning for much of the surrounding property of the site in question is also residential had has been for some time.

In December 1988, plaintiffs applied to the East Brunswick Zoning Board of Adjustment for a use variance to convert the existing single family dwelling to an office. Public hearings were held on plaintiff's application on January 18, 1989 and continued on March 13, 1989, April 10, 1989 and May 1, 1989.

Numerous neighbors and other members of the community voiced objections to the granting of a use variance during these hearings.

The plaintiff, Richard Sackman, presented the testimony of four witnesses in addition to his own.

Nick Reale, a real estate broker, testified that the subject property could not be sold as residential property, although his conclusion was vigorously challenged on the basis that the property had been priced too high for sale within a reasonable time; Robert Hyer, a real estate appraiser, testified on the issue of how surrounding property values would be affected if the Board granted a use variance for plaintiff's property; James Dodge, a planner, expressed an opinion that the granting of the variance would not be detrimental to the public good and that it would not impair either the intent of the zoning ordinance or the Master Plan; and, finally, Thomas Weingartner, a civil engineer, spoke of efforts to ameliorate the effects of the plaintiffs' proposed requisite parking lot on the neighboring properties. He told of plans for comprehensive landscaping designed to maintain the residential nature of the building.

Plaintiffs contend that by this testimony they

met their burden of proof of both the positive and negative criteria as set forth in the Statute. However, on May 1, 1989, The Board denied the application finding that the Applicants' testimony taken as a whole did not indicate any special reasons for the granting of the variance.

In addition, the Board found that such testimony did not indicate what overall impact the proposed use would have on the Master Plan of East Brunswick. The Board also determined that approving this use variance would adversely affect the value of adjacent and nearby properties and alter the essential character of the neighborhood. Further, the findings concluded that the granting of this variance would be detrimental to the health, safety and welfare of the general public, and that it would not be without substantial detriment to the public good and without substantial impairment of the intent and purpose of the Zone Plan and the zoning Ordinance.

It is a well-established principle, governing judicial review of a decision of a municipal board on a variance on site plan application, that said decision

is presumed by the court to be correct and is to be upset only in the event that it is shown that the decision was arbitrary, unreasonable or capricious.

The courts of this State have grounded this presumption in favor of the municipal board on the recognized fact that "local officials are best equipped to pass on variance applications and must be given wide latitude in the exercise of their discretion."

As set forth by our Supreme Court in Kramer v. the Board of Adjustment of Sea Girt, 45 N.J. 268 (1965), the question that this Court must address is:

> ...whether the authorities could reasonably conclude from the evidence presented that 'a special reason' existed for the granting of the variance sought and whether it could be done without any substantial detriment to the public good or substantial impairment of the zoning plan and ordinance.

It is certainly not the function of this Court to review the record and make independent findings of fact and conclusions of law on a de novo basis. Plaintiff is not entitled to a new trial on the record but rather only to a determination as a matter of law on the

record as to whether the Board could have reasonably concluded from the evidence presented and under the applicable legal standards that the variance should be denied.

N.J.S.A. 40:55D-70(d) empowers the municipal board of adjustment to grant variances, allowing departures from zoning regulations on the condition that an application show both that "special reasons" for the variance exist, and that "such a variance...can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance" -- the so-called "negative criteria".

In addition the case of Medici v. B.R.P.. Co., 107 N.J. 1, decided relatively recently by the New Jersey Supreme Court, added the requirement of "an enhanced quality of proof" as to the negative criteria.

Plaintiff submits that he has met the burden of proving special reasons through the testimony of his witnesses who told of the unmarketability of the property as a residence and who emphasized the changes in the area that impacted on the desirability of the

property for use as a single-family home. Parenthetically, Plaintiff, who purchased the house in October 1988, with the purpose of applying for the use variance testified that he had planned to use it as a residence for his adult sons if the variance were not to be granted.

Contrary to the assertions in Plaintiffs' brief, the transcript reveals substantial challenge to the conclusions of Plaintiff's witnesses. The Board certainly has the discretionary power to accept or reject the testimony of witnesses and, where reasonably made, such choice is conclusive on appeal.

In addressing the question of whether or not the plaintiff has met the "enhanced negative criteria" standard of Medici the Board was required to inquire if the plaintiff's proofs showed that a granting of the application was consistent with the intent and purpose of the master plan and zoning ordinance. The Board must be satisfied that the proofs and findings satisfactorily reconciled the grant of a use variance with the ordinances continued omission of the proposed

use from those permitted in the zone thereby providing a more substantive basis (emphasis added) for the conclusionary determinations presented by Plaintiff's witnesses that the variance would not substantially impair the intent and purpose of the zone plan and zoning ordinance.

The Board's answer was obviously in the negative. Although this hearing took place in early 1989, the then Proposed Master Plan, adopted April 4, 1990, maintains the subject area as residential although it now includes multi-family buildings are a permissible use, still it remains residential, not commercial.

By its requirement that the Board of Adjustment apply the enhanced proof standards, the supreme Court stated that "...it will serve to effectuate the Legislature's apparent objective of encouraging municipalities to make zoning decisions by ordinance rather than by variance,_"Medici, supra at 5. Accordingly, this Court makes the following factual determinations:

1.) The granting of the said variance would not be without substantial impairment of the intent and purpose of the Zone Plan and the Zoning Ordinance.

2.) The Board did not act in an arbitrary, capricious or unreasonable manner in denying the variance pursuant to the ordinance and in consideration of the testimony given at the hearings before it.

3.) After a review of the testimony of Plaintiff's experts and the arguments of counsel, this court is satisfied that plaintiffs have failed to prove special reasons or establish negative criteria to compel the Board to grant the variance.

Defendant's attorney will submit an appropriate form of Judgement in accordance with this Opinion under the 5 day Rule.

No costs are assessed to either party.

Very truly yours,

JOYCE E. MUNKACSI, J.S.C.

JEM:eca

APPENDIX 62

Township of East Brunswick

Zoning Board of Adjustment
Application #Z-88-89

Whereas, Richard Sackman and Marilyn Sackman have applied to the Board of Adjustment of the Township of East Brunswick for relief regarding a use variance to allow for the utilization of an existing single-family dwelling as an office with bulk variances to allow for site improvements in relation to that use at premises in the Township of East Brunswick known as Lot 10.108 and Block 319 in the R-3 Zone; and

Whereas, public hearings were held on January 18, 1989, March 6, 1989, March 18, 1989, April 10, 1989 and May 1, 1989; and

Whereas a number of persons objected to the application; and

Whereas the Board after carefully considering the evidence presented to it by or on behalf of the applicant and by or on behalf

of the adjoining property owners and the general public has made the following findings of fact:

1. Applicant proposes to utilize the existing single-family dwelling as an office and to make site improvements in relation to
that use at the site which is zoned R-3.

2. Testimony presented by the applicant has not indicated what the overall impact of this proposed use would be on the Master Plan of East Brunswick Township.

3. Evidence presented before the Board of Adjustment indicates that the property can be used as presently zoned in the R-3 Zone and sold in this area of the Township.

4. A granting of a variance for this application will cause substantial detriment to the existing Master Plan of the Township of East Brunswick.

5. The applicant's testimony taken as a whole has not indicated any special reasons for the granting of a variance for the subject premises.

6. That the granting of the proposed relief would change the character of the surrounding neighborhood.

Whereas, the Board has made the following ultimate findings of fact:

1. That the granting of said variance will adversely affect the value of adjacent and nearby properties.

2. That the granting of said variance will alter the essential character of the neighborhood.

3. That the granting of said variance will be detrimental to the health, safety and welfare of the general public.

4. That the granting of said variance will not be without substantial detriment to the public good and without substantial impairment of the intent and purpose of the Zone Plan and Zoning Ordinance.

Now, Therefore, Be It Resolved, by the Board of Adjustment this 1st day of May 1989, on the basis of evidence adduced before it, the aforesaid findings of fact and ultimate findings and conclusions, that this

Board does hereby deny the use variance request to permit the utilization of an existing single-family dwelling as an office and bulk variances to make site improvements in relation to that use.

This is to certify that the foregoing is a true copy of a Resolution adopted by the Board of Adjustment at its regular meeting held on June 5, 1989.

Nora McShane, Zoning Board Secretary